

Memorandum April 25, 2005

TO: Hon. Kent Conrad
Attention: Tracee Gross

FROM: Pervaze Sheikh
Environmental and Natural Resources Policy Analyst
Resources, Science, and Industry Division

Julie Jennings
Knowledge Services Group
Resources, Science, and Industry Division

SUBJECT: References Submitted to the International Joint Commission

This memorandum responds to your request for information on references brought to the International Joint Commission (IJC) since its inception in 1909.¹ An introduction and overview of the reference process is provided, as well as a table with all of the characteristics of each reference submitted to the IJC since its inception. **Table 1** includes a description of the reference, such as the recommendations that resulted, duration of the reference process, and the initiator of the reference, where information is available. Currently five references are pending and 46 have been completed.

If you have further questions, please contact Pervaze Sheikh at 7-6070.

Background on the Application and Reference Process

The IJC is an independent organization established by the Boundary Waters Treaty of 1909² to help prevent and resolve disputes, and to advise on issues related to the use

¹ A reference is a question or matter of difference between the United States and Canada regarding boundary waters that is brought to the IJC for consideration.

² The Boundary Waters Treaty of 1909 established basic legal principles to deal with boundary and transboundary waters between the United States and Canada and created the IJC. The treaty also provides for the reference of issues to the IJC for investigations and recommendations and prohibited diversions of water that affected the natural level or flow of boundary waters without the approval of Canada or the United States, and the IJC.

and quality of boundary waters between the United States and Canada.³ The IJC has six commissioners, three appointed by the President of the United States, with the approval of the Senate; and three appointed by the Governor in Council of Canada, with the advice of the Prime Minister. The commissioners follow the Treaty to resolve disputes between the United States and Canada over various aspects of boundary waters, including their use and consumption. The IJC needs a quorum of four (with at least one member from each of the countries) to make decisions, and generally reaches decisions through consensus and not through formal votes. When making decisions, each commissioner does not formally represent their country, and must declare in writing that he/she will be impartial when carrying out the duties of the Treaty.

There are two primary duties of the IJC: 1) The IJC's approval is required for any work in boundary waters affecting water levels on either side of the boundary; and 2) the IJC may examine and report on questions of matters of difference between the U.S. and Canadian governments. An *application* seeks the approval of the IJC for building a structure that would use, change (with respect to water level), obstruct, or divert waters of the Great Lakes with respect to Article III or IV of the Boundary Waters Treaty. The application may be submitted by either of the governments.⁴ The IJC reviews applications and then decides whether to approve the project, not approve the project, or approve the project with conditions. If a decision is to approve a project with conditions, a control body is generally set up to oversee the implementation.

A *reference* addresses a question or a matter of difference between the United States and Canada. A reference can either be submitted by both countries or one country. According to the IJC, the submission of a reference by one country has "almost never happened."⁵ If jointly submitted, the reference contains specific questions the governments want the IJC to answer and a time frame for a response, among other things. Under Article IX of the Treaty, the IJC is authorized to examine and report the facts of the questions under the reference, and to draw conclusions and make recommendations as appropriate. Once a reference has been received, the IJC generally appoints a board or task force to conduct the technical investigations. Public hearings and other forms of consultation are held, and a report with findings and recommendations is prepared for both governments. Once the IJC issues a report, the governments may request it to monitor progress in implementing the report's recommendations. The IJC generally appoints a board to carry out these functions. The recommendations of the IJC in response to references are non-binding; however, under Article X, references that involve the rights, obligations, or interests of either government in relation to the other can be

³ Boundary waters are defined in the Preliminary Article of the Treaty as "the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary."

⁴ A person seeking the approval of the IJC for an activity would submit an application to the government within whose jurisdiction the activity would take place. The Government may then forward the application to the IJC for review.

⁵ Personal communication with Frank Bevacqua, Public Information Officer, International Joint Commission, Apr. 18, 2005.

presented to the IJC for a binding decision. The IJC has never received a reference under Article X.⁶

The financing of investigations for references is generally shared by the United States and Canada. For the U.S. portion, up until the 1980s, agencies who had representatives that served on boards would fund data collection and analyses for investigations, according to the IJC. Since then, financing came from in part from direct appropriations from Congress either to the lead agency involved in the investigation (e.g., the Environmental Protection Agency) or to the IJC. Limited investigations have been financed from the operating budget of the IJC.

In **Table 1**, we have provided a list of references sent to the IJC by the U.S. and Canadian governments since its inception in 1909.⁷ For each reference, there is a description, year received, duration, and summary of the recommendations. There have been 51 references sent to the IJC by the United States and Canada. Forty-six references have been completed and five are pending. The time required to complete a reference has averaged approximately eight and a half years.⁸ Some references have taken as little as six weeks to finish; whereas one has taken up to 73 years to complete. Recommendations for each reference were provided by the IJC, but whether the recommendations were implemented by the United States and Canada was not identified in all cases. The IJC does not always follow-up on the implementation of its recommendations; however, the table notes the cases where they did follow-up.

⁶ Ibid.

⁷ The description of the references, duration, requesting parties, and recommendations were provided by Frank Bevacqua, Public Information Officer, International Joint Commission, Apr. 20, 2005.

⁸ Duration was measured from the date of the reference request to the submission of the final report by the IJC.